IN THE

Supreme Court of the United States

FILED
FEB 6 1967
JOHN F. DAVIS, CLERK

OCTOBER TERM 1966

No. 1031

DANIEL LOVALL SPIGNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Southern District of California, Southern Division.

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Southern District of California, Southern Division.

This is a petition of Daniel Lovall Spigner for Writ of Certiorari to review the Judgment and Order made by the United States Court of Appeals for the Ninth Circuit on December 8, 1966, affirming the Judgment against Petitioner made and entered by the United States District Court for the Southern District of California, Southern Division, on May 2, 1966, after a jury verdict of guilty had been returned on all three counts of the Indictment on March 29, 1966.

A copy of the affirming judgment and of the Opinion of the United States Court of Appeals for the Ninth Circuit, which are as yet unreported, are attached. (Appendices A and B, respectively). On December 29, 1966,

the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, issued an Order Extending Time to File Petition for Writ of Certiorari to February 6, 1967. (Appendix C).

Jurisdiction

The District Court had jurisdiction in this case under Title 21 U.S.C., § 176(a) and Title 18 U.S.C., § 545.

The Circuit Court had jurisdiction under Title 28 U.S.C., § 1291 and § 1294.

This Court has jurisdiction under Title 28 U.S.C., § 1254(1) to review the judgment in question.

Statement of the Case

On February 2, 1966, a three-count indictment was filed against Petitioner charging him in Counts I and II with violating Title 21 U.S.C., § 176(a) (smuggling and concealing marijuana) and in Count III with violating Title 18 U.S.C., § 545 (smuggling merchandise).

On March 29, 1966, after a trial by jury, a verdict of guilty was returned on all counts of the indictment. The judgment sentencing the Petitioner to the custody of the Attorney General for a period of six years and a Notice of Appeal were both filed on May 2, 1966. On May 18, 1966, an Order issued permitting Petitioner to appeal in forma pauperis. On June 9, 1966, an order issued extending the time for filing the record and docketing the appeal.

On December 8, 1966, the United States Court of Appeals for the Ninth Circuit affirmed the Judgment of Conviction. On December 29, 1966, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, issued an Order Extending Time to File the Petition for Writ of Certiorari to February 6, 1967.

Questions Presented

1. Whether the United States Court of Appeals for the Ninth Circuit erroneously interpreted the pronouncements of this Court in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed 2d 694 and *Johnson v. New Jersey,* 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 by applying the "non-retroactivity" doctrine in the Federal Courts.

2. Whether in light of this Court's decisions in *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653, *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed 2d 678, *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed 2d 106 and *Spevack v. Klein,* United States Supreme Court Bulletin B625 (January 16, 1967), the prior decision of *Yee Hem v. United States,* 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed 904 and related cases should be overruled, and, in connection therewith;

A. Whether that portion of Title 21 U.S.C. § 176(a) which provides

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury"

constitutes a violation of the Fifth Amendment to the United States Constitution (Freedom from self-incrimination) in that said section produces a statutory compulsion to testify or explain without any further constitutional safeguards, irrespective of whether a cautionary instruction is given.

B. Whether the explanation given by the trial judge as to the difference between "actual" and "construc-

tive" possession in light of the provisions of Title 21 U.S.C., § 176(a) were confusing, erroneous and prejudicial.

C. Whether in fact the evidence was insufficient as a matter of law to show that the Petitioner knowingly transported or smuggled narcotics across the United States border, either circumstantially or otherwise.

1. Whether the connection between the fact of possession of marijuana and the presumption that the defendant smuggled such marijuana into the United States is so tenuous as to make that presumption a violation of due process of law.

Statutes and Constitutional Provisions Involved

The relevant Constitutional statutory provisions are printed in Appendix D. They are:

Title 21 U.S.C. § 176(a); Title 18 U.S.C. § 545; Fifth and Sixth Amendments to the United States Constitution

Statement of the Facts[1]

John T. Lavelle, an inspector for the United States Immigration Service, observed the Petitioner entering the United States from Mexico at about 9:00 p.m. on December 19, 1965. Petitioner was driving a 1955 Cadillac automobile and had four chalk cats lying on the back seat of the car. (R.T. 27). Petitioner stated he had been

[1] Because of the late date on which this counsel for Petitioner was retained, counsel has been unable to procure the Reporter's Transcript on appeal. As a result, counsel was compelled to rely on the Statements of Fact and Reporter's Transcript citations contained in the Appellant's and Appellee's Opening Briefs on Appeal. The indulgence of this Court is sought in the event any citations contained herein are erroneous. Page references are to the Reporter's Transcript on Appeal.

to the races but Mr. Lavelle testified that he did not see any programs or racing papers in the car and that the races were over about 6:00 p.m. Mr. Lavelle further testified that Petitioner seemed to be nervous. (R.T. 29). Mr. Lavelle had been an inspector for twenty years (R.T. 26).

Inspector Lavelle turned Petitioner over to Customs Inspector Claude Yates for further search (R.T. 33). Mr. Yates directed the vehicle and Petitioner to the secondary inspection area and performed a search of Petitioner and the vehicle. A personal search of Petitioner was negative (R.T. 34). The search of the vehicle disclosed marijuana debris and seeds under the rear seat that had been wet and sprouted and parts and bits of marijuana debris behind the quarter panel on the opposite side and in the trunk. (R.T. 41). Upon taking the ashtray out of the arm rest and peering into the right quarter panel, Inspector Yates observed a revolver. Upon removing the arm rest panel, Inspector Yates found 23 packages of what appeared to be marijuana and two loaded revolvers. Petitioner told the inspectors the automobile belonged to him. (R.T. 60).

After finding the marijuana and guns, Customs Agent Randolph Aros was called to the Port of Entry to interrogate the Petitioner. The marijuana and guns were turned over to him (R.T. 40-44). After advising Petitioner of his Constitutional rights,[2] Petitioner stated, in essence, that the vehicle belonged to one Joe Smith who

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[2] Although the Government agents attempted to advise Petitioner of his Constitutional rights, it was conceded by the Government in its Brief on appeal that the Petitioner was not told that he had the right to have an attorney appointed for him if he could not afford counsel. The argument in connection with this issue will be more fully set forth in the subsequent paragraphs of this Petition.

lived near the 4000 Block on Compton Avenue in Los Angeles. Petitioner did not at this time mention the Jordan Downs Housing Project. (R.T. 92). At this point, Petitioner apparently refused to further discuss the case. (R.T. 90-92).

Petitioner testified that he had gone to Mexico to the races with one Joe Smith and that Smith had told him that he was going to return to Los Angeles with a lady friend and left the vehicle for Petitioner to return to Los Angeles and leave at Petitioner's residence in Los Angeles. Petitioner unequivocally denied knowledge of any contraband in the automobile (R.T. 59-60). Petitioner testified that Joe Smith lived near him in the Jordan Downs Housing Project (R.T. 69-79) and denied telling Mr. Aros that Joe Smith lived in the 4000 block of Compton Avenue. (R.T. 70-71). Petitioner further denied telling Mr. Aros that he was to meet someone. (R.T. 76).

Petitioner claimed to have been drinking in bars from 6:00 to 9:00 p.m. on December 19 and estimated that he drank five "rum and cokes". (R.T. 77). Inspector Yates later testified that he searched the Petitioner in a 6 x 6 closed room and noticed no smell of alcohol. (R.T. 86-87).

It is clear from the testimony of Randolph Aros that he did not advise the Petitioner that if he could not afford counsel, one would be provided for him (R.T. 89). Aros also testified that Petitioner made no remarks regarding the marijuana or guns found in the car. (R.T. 90). On cross-examination the witness Aros testified that he had verified that the automobile in question was registered to one Joe Smith of 68 E. 45th Street, Los Angeles, California. The witness testified that no attempt was made to find the owner of the car. (R.T. 94).

Reasons for Granting the Writ

1. In light of the Circuit Court's holding that this Court's pronouncements in *Miranda v. Arizona, supra,* are not to be retroactively applied in the *Federal* Courts, a clear delineation by this Court as to whether the "non-retroactivity" doctrine is to be applied in the Federal Courts is needed.

2. In light of this Court's decisions in *Malloy v. Hogan, supra, Murphy v. Waterfront Commission of New York, supra, Griffin v. California, supra* and *Spevack v. Klein, supra,* the issue of whether *Yee Hem v. United States, supra,* is now out of harmony with this Court's recent pronouncements and should be overruled is squarely presented.

Argument

1. Whether the United States Court of Appeals for the Ninth Circuit erroneously interpreted the pronouncements of this Court in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed 2d 694 and Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed 2d 882, by applying the "non-retroactivity" doctrine in the Federal Courts.

In its Opinion, the Circuit Court of Appeals made the following statement:

> "Appellant urges that 'certain statements' made by him after his arrest were inadmissible because contrary to the rule announced in *Miranda v. Arizona,* 384 U.S. 436, (1966). Assuming that the statements made come within the *Miranda* rule, that rule was held not retroactive to persons whose trials had not begun as of June 13, 1966 (*Johnson v. New Jersey,* 384 U.S. 719, 730 (1966).) Appellant was tried on

March 29, 1966. Hence the *Miranda* rule does not apply to him."

It is respectfully submitted that the application by the Circuit Court of the "non-retroactivity" rule of *Johnson v. New Jersey, supra,* to a Federal Court prosecution constituted prejudicial and reversible error.

While it cannot be doubted that this Court in *Johnson v. New Jersey, supra,* held that the principles of *Miranda v. Arizona* were to be prospectively applied only, it is equally clear that this Court's enunciation of the "non-retroactivity" rule was directed solely and exclusively to State court prosecutions. The following language from *Miranda* clearly indicates that the rules set forth therein had been the law in the Federal Courts for a number of years. Consequently, it was not necessary for nor did this Court intend to apply the "non-retroactivity" rule to a Federal Court prosecution. In *Miranda,* the Court stated:

> "The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. . . .
>
> *"This question in fact, could have been taken as settled in Federal Courts almost 70 years ago,* when in *Bram v. United States,* 168 U.S. 532, 542 (1897) this Court held:
>
> 'In criminal trials, in the Courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person "shall be compelled in any criminal case to be a witness against himself".'
>
> "....

"Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure and this Court's effectuation of that Rule in *McNabb v. United States,* 318 U.S. 332, (1943), and *Mallory v. United States,* 354 U.S. 449 (1957) we have had little occasion in the past quarter century to reach the Constitutional issues in dealing with Federal interrogations. *These supervisory rules, requiring production of an arrested person before a commissioner 'without unnecessary delay' and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. . . .*" (Emphasis added) (384 U.S. 436, 16 L.Ed.2d 715, 716.)

As can be readily discerned from the foregoing quote, it has been the Federal rule for a substantial period of time that the principles of *Miranda* apply to Federal prosecutions. In essence, *Miranda* sets forth four requirements which must be complied with before a statement or admission given by a defendant is admissible into evidence. Thus, the defendant must be warned that (1) he has a right to remain silent; (2) that any statement he does make may be used as evidence against him; (3) that he has a right to be represented by counsel of his own choosing and (4) that if he cannot afford counsel, counsel will be appointed for him. (*Miranda v. Arizona, supra,* 16 L. Ed 2d 706, 707)

Since it is conceded that the Petitioner herein was not told that if he could not afford counsel, one would be appointed for him, it is respectfully submitted that the judgment of conviction must be reversed in that statements of Petitioner which were admitted into evidence were obtained in violation of the V and VI Amendments to the U.S. Constitution as set forth in *Miranda, supra.*

2. Whether in light of this Court's decisions in Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653, Murphy v. Waterfront Commission of New York, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed 2d 678, Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed 2d 106 and Spevack v. Klein, United States Supreme Court Bulletin B 625 (January 16, 1967), the prior decisions of Yee Hem v. United States,[3] 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed 904 and related cases should be overruled, and, in connection therewith;

A. Whether that Portion of Title 21, U.S.C. § 176(a) which provides

> *"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury"*

constitutes a violation of the Fifth Amendment to the United States Constitution (freedom from self-incrimination) in that said section produces a statutory compulsion to testify or explain without any further constitutional safeguards, irrespective of whether a cautionary instruction is given.

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[3] *Yee Hem v. United States, supra,* is apparently the first and only case which directly holds that a presumption identical to that set forth in Title 21 U.S.C. § 176(a) does not violate the defendant's privilege against self-incrimination. Other cases have, however, sustained the reasoning, if not the principle, enunciated in *Yee Hem* (see e.g., *Casey v. U.S.*, 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed 632; *Bozza v. U.S.*, 330 U.S. 160, 67 S. Ct. 645, 91 L. Ed 818, and *United States v. Gainey*, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed 2d 658.) It is respectfully submitted that if this Court deems it appropriate to overrule *Yee Hem*, the language in *Casey, Bozza* and *Gainey* approving *Yee Hem* must be disavowed.

Title 21 U.S.C. § 176(a), after setting forth the substantive offense proscribed therein, provides:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

It is respectfully submitted that the above quoted presumption of § 176(a) constitutes a violation of the defendant's privilege against self-incrimination in that the defendant is compelled to testify or suffer a judgment of conviction on no more evidence than the fact of possession and the existence of the presumption. A review in chronological order of the significant cases in this area serves to buttress Petitioner's contentions.

Apparently *Yee Hem v. United States, supra,* 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed 904 is the first and only case which directly holds that a presumption such as that contained in § 176(a) does not violate the Fifth Amendment's proscription against testimonial compulsion. The Court indicated that the presumption was merely a rule of evidence and to be valid there need only be a rational connection between the fact proved (in the instant case — possession) and the ultimate fact presumed (in the instant case — smuggling of marijuana). In one ill-advised paragraph, the Court stated, in answer to the defendant's contention that the presumption violated his Fifth Amendment rights:

> ". . . The statute compels nothing. It does no more than to make possession . . . prima facie evidence of guilt. It leaves the accused entirely free to testify or not, as he chooses." (268 U.S. 178, 185)

The Court concluded by saying that if the accused is the only person who can rebut the presumption, that is a problem inherent in the case and one for which the presumption is not at fault.

Since *Casey v. United States,* 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed 632, involved a presumption somewhat different than that involved in both *Yee, Hem* and the instant case,[4] the case is not extremely significant with respect to the instant case, except insofar as the court therein used reasoning similar to that employed in *Yee Hem.*

Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed 1519, is the next significant case. In *Tot,* the court, in dealing with the presumption contained in the Federal Firearms Statute, held that the presumption was invalid. The basis of the court's decision was that there was no rational connection between the fact proved (possession of a firearms by a felon) and the ultimate fact presumed (that the firearm was shipped or transported in *inter*state commerce). The court reasoned that it was quite possible that the defendant had obtained the firearms from an *intra*state shipment and, therefore, the connection between the fact proved and the fact presumed was too tenuous.

Tot is also most important because of the statement made by Justice Black in a concurring opinion (in which Justice Douglas joined). Although *Yee Hem* would seem to have laid to rest the issue of the applicability of the Fifth Amendment to a presumption such as is contained in § 176(a), such is apparently not the case in light of Justice Black's statement that:

[4] The presumption in *Casey* provided that the absence of the required stamp for a package of morphine was prima facie evidence that a person in possession of the morphine was guilty of obtaining the morphine illegally.

"It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment." (319 U.S. 463, 473.)

In *United States v. Gainey,* 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed 2d 658, the court upheld the presumption that mere presence at an illegal still was sufficient to convict a person for carrying on the business of operating a distillery. Strong dissents were filed by both Justices Black and Douglas. In his dissent, Justice Black stated:

"The undoubted practical effect of letting guilt rest on unexplained presence alone, is to force a defendant to come forth and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. The compulsion here is of course more subtle and less cruel physically than compulsion by torture, but it is nonetheless compulsion and it is nonetheless effective. I am aware that this Court in *Yee Hem v. United States,* 268 U.S. 178, 185, 69 L. Ed 904, 906, 45 S. Ct. 470, held that use of a presumptious squeeze like this one did not amount to a form of compulsion forbidden by the Fifth Amendment. The court's reasoning was contained in the single paragraph, the central argument of which was that despite a presumption like this a defendant is left 'entirely free to testify or not as he chooses'. That argument it seems to me, would also justify admitting in evidence a confession extorted by policemen pointing a gun at

the head of the accused, on the theory that the man being threatened was entirely free to confess or not, as he chooses. I think the holding in *Yee Hem* is completely out of harmony with the Fifth Amendment's prohibition against compulsory self-incrimination, and I would overrule it. . . ." (380 U.S. 63, 87-88).

Although both *Malloy v. Hogan*[5] 378 U.S. 1, 84 S. Ct. 1489, 12 L. ed 2d 653 and *Murphy v. Waterfront Commission of New York*[6] 370 U.S. 52, 84 S. Ct. 1594, 12 L. Ed 2d 678, pre-dated *Gainey*, this Court, in spite of the remonstrations of Justices Black and Douglas, did not choose to re-examine in *Gainey* the issue of the effect of the presumption involved in that case on the defendant's Fifth Amendment rights. It may well have been that *Gainey* did not present the proper facts on which to examine the *Yee Hem* rule since the presumption there involved constituted much less of a compulsion to testify than that involved in the instant case.

The next decision by this Court relevant to the issue here under discussion is *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed 2d 106, reh. den. 381 U.S. 957, 85 S. Ct. 1797, 14 L. Ed. 2d 730. In *Griffin*, this Court held unconstitutional that portion of the California Constitution which permitted comment by the prosecution on the failure of the defendant to testify. The Court also held unconstitutional and violative of the Fifth

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[5] In *Malloy*, this Court held that the Fifth Amendment's proscription against compulsory self-incrimination applied to the States through the Fourteenth Amendment.

[6] In *Murphy*, this Court held that one jurisdiction could not compel a witness to whom it had granted immunity from prosecution under its laws to give testimony which might then be used to convict him of a crime against another jurisdiction.

Amendment the Court's instruction that the failure to testify constituted evidence of guilt.

The import of *Griffin* on the issues here under discussion can best be understood when it is remembered that the Court in *Yee Hem* stressed the point that the presumption therein involved (which is identical to the one involved in the instant case) was no more than a *rule of evidence. Griffin* rejected such reasoning and held that such a rule of evidence violated the constitutional prohibitions of the Fifth Amendment. In *Griffin,* the court stated:

> "... The question remains whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment.
>
> "We think it does. It is in substance a *rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the Court's acquiesence are the equivalent of an offer of evidence and its acceptance.* The Court in the *Wilson* case stated:
>
> '... The act was framed with a due regard also to those who might prefer to rely upon the presumption of innocense which the law gives to everyone, and not wish to be witnesses. It is not everyone who can faithfully venture on the witness stand though entirely innocent of the charges against him. Excessive timidity, nervousness, when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would,

therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him.' (149 U.S., P. 66, 37 L. Ed. P. 651)" (Emphasis added.) (380 U.S. 609, 613.)

Two other cases are worthy of mention. In *United States v. Romano,* 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed 2d 210, perhaps influenced to some extent by the *Griffin* decision, this Court held invalid the presumption which provided that the defendant's presence at an illegal still was sufficient evidence to authorize a conviction for being in possession, custody and control of an illegal still, unless the defendant explained his presence to the satisfaction of the jury.

In the recent case of *Spevack, v. Klein, United States Supreme Court Bulletin B 625* (January 16, 1967), this Court overruled the case of *Cohen v. Hurley,* 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 and held that an attorney, as in the case of any other individual, is entitled to the full protection of the Fifth Amendment. The *Spevack* decision, undoubtedly represents a further erosion of the principles of prior cases which fail to afford the Fifth Amendment the veneration to which it is entitled.

In light of the foregoing analysis, and especially in light of *Griffin v. California, supra,* it is respectfully submitted that *Yee Hem* is out of harmony with the recent Fifth Amendment decisions of this Court and should be overruled. While it may ease the judicial conscience to say that a presumption such as is contained in § 176(a)

is merely a rule of evidence, such sophistry cannot obscure the true fact that such a presumption either compels the defendant to testify or suffer a finding of guilt. In fact, Instruction No. 10[7] given to the jury in this case was tantamount to instructing the jury to find the Petitioner guilty. No cautionary instruction, no matter how carefully worded, can serve to erase from the jury's mind the fact that they may convict with no more evidence before them than the fact that defendant was in possession of the contraband.[8]

Petitioner concedes that the presumption here under discussion relates to the first and second Counts of the Indictment only. It is submitted, however, that the very existence of the presumption, the manner in which it was read to the jury and the instructions taken as a whole clearly indicate that the jury may well have believed that the presumption applied to Count III as well as Counts I and II. Certainly the jury was not instructed that the presumption related to Counts I and II only.

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[7] Instruction 10 was given as follows: Title 21, Section 176(a) of the United States Code provides in part as follows:

> "Whenever on trial for a violation of this subsection the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." (Marihuana — 21 USC Sec. 176(a) — Sale, Possession-Statutory Presumption)

[8] It should be noted that a peripherally related issue is raised in connection with the presumption of § 176(a). Specifically, assuming the Petitioner's exculpatory statements were admissible, the only direct evidence which rebutted such testimony was the presumption itself. Arguably, if the presumption is invalid, the only remaining evidence is that of the Petitioner's exculpatory statements. Since the prosecution elicited such statements, it would seem that is should be bound by them and that a conviction could not be had as a matter of law. See e.g., *People v. Collins*, 189 Cal.App.2d 575, 11 Cal.Rptr. 504.

B. Whether the explanation given by the trial judge as to the difference between "actual" and "constructive" possession in light of the provisions of Title 21 U.S.C. § 176(a) were confusing, erroneous and prejudicial.

An examination of the instructions given by the trial court, viewed together with its "explanations" of "actual" and "constructive" possession leads to the inescapable conclusion that the court in fact instructed the jury to find the Petitioner guilty. The comments by the court in instructing the jury on actual and constructive possession are set forth in Appendix E hereof. The court's comments presumed knowledge of the contraband and left for the jury to determine merely whether the possession was actual or constructive. Nowhere in its comments did the court state or even infer to the jury that if Petitioner did not know the existence or presence of the contraband he would not be in actual or constructive possession. Such a statement should have been made by the court since the cases have emphasized that possession must be a "knowing" possession. *Jackson v. United States,* 330 Fed. 2d 679, 681 (8th Cir. 1963).

It is submitted that the court's comment on the instructions constituted prejudicial error. In *Starr v. United States,* 153 U.S. 614, 14 S. Ct. 919, 38 L. Ed. 841, this Court stated that the influence of the trial judge on a jury is necessarily and properly of great weight and his slightest word or intimation may be controlling. Since the comments made by the Court left no room for the jury to find that the Petitioner was not in possession of the contraband at all, it is submitted that the Court in fact inferred to the jury that the Petitioner was guilty of having either actual or constructive possession.

C. Whether in fact the evidence was insufficient as a matter of law to show that the Petitioner knowingly transported or smuggled narcotics across the United States border, either circumstantially or otherwise.

1. *Whether the connection between the fact of possession of marijuana and the presumption that the defendant smuggled such marijuana into the United States is so tenuous as to make that presumption a violation of due process of law.*

It is submitted that the evidence presented by the prosecution was insufficient as a matter of law to sustain a conviction on any of the three counts of the Indictment. The evidence in this case indicates that on December 19, 1965, the Petitioner was driving a 1955 Cadillac automobile across the border from Mexico to the United States and that the automobile contained contraband. Petitioner at all times denied knowledge of the contraband and indicated that the automobile belonged to one Joe Smith. This latter fact was verified by a Government agent (R.T. 94). While it is true that knowledge may be shown by circumstantial evidence, such evidence must create more than a mere suspicion. *Spalitto v. United States,* 39 Fed 2d 782 (8th Cir. 1930). It is submitted that the facts that Petitioner denied knowledge of the contraband, that the car was not Petitioner's and that Petitioner's testimony was essentially unrefuted presents a situation wherein the evidence was insufficient as a matter of law to sustain a conviction.

Assuming arguendo that the presumption of § 176(a) is held valid (see discussion, *supra*) it is submitted that the connection between the fact proved in the instant case (possession) and the ultimate fact presumed (smuggling into the United States and concealing marijuana) is too tenuous. *Tot v. United States, supra.* It is almost the subject of judicial notice that marijuana is grown,

albeit illegally, in many areas of the United States. There are numerous cases on record in the State and Federal Courts in California wherein prosecutions were made for illegally growing marijuana. Since marijuana can be and is grown in the United States, how can it be reasonably said that from the fact that a person is found in possession of marijuana it may be presumed he smuggled marijuana into the United States. Under the circumstances, the inference becomes ". . . so strange as not to have a reasonable relation to the circumstances of life as we know them". *United States v. Romano, supra,* at p. 213. In *Tot v. United States, supra,* the court stated:

> "Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provisions.
>
> "Doubtless the defendant in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But as we have shown, it is not permissible for us to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient answers to the proof, and where requiring him to go forward with proof will not subject

him to unfairness or hardship." (319 U.S. 463, 469-470).

Conclusion

Petitioner respectfully submits that a review of the record in this case will indicate that this Petition for Writ of Certiorari should be granted and that the Judgment of the Circuit Court affirming the judgment of the District Court should be reversed.

Respectfully submitted,

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